

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.280 OF 2003

...

Union of India ...Petitioner

v/s

Jay Constructions & ors. ...Respondents

...

Mr.Suresh Kumar for the Petitioner.

Mr.G.L.Masand for the Respondents.

CORAM: D.K.DESHMUKH, J.

DATED: 19TH JULY, 2005

P.C.:

1. By this petition the Petitioner challenges the

award made by the sole arbitrator dated 9th December, 2002.

2. The facts relevant for deciding this petition are the the Respondent No.1 was awarded the work by work order dated 5-6-1997. The work was to be completed within a period of three months from the date of the Work Order. The work was not commenced and nothing was done. On 11-12-1997 the Respondent applied for extension of time till 16-3-1998. He stated in the letter

"The above work could not be started during monsoon and subsequent wet ground conditions. We are prepared to carry out the above work from 15th December, 1997 and will be completing within three months period."

Therefore, extension was sought till 16-3-1998. A contract was entered into in January, 1998 and the contract period was extended from 3-9-1997 to 15-3-1998. It appears that in February, 1998 some work was done by the Respondent, but again he stopped doing the work. By letter dated 26-11-1998, the Respondent was informed that he has not completed the

work within the extended time i.e. 15-3-1998. He has also not applied for extension. It appears that, therefore, the Respondent made an application in Form-A for extension of period for completion of the work. He states that extension is already granted from 5-11-1997 to 15-3-1998. He sought extension till 30th April, 1998. He stated that he is seeking extension "up to 30th April, 1999 on Railway's account. Work suspended during monsoon." Thus, according to the Respondent, extension was necessary because work could not be completed and the work could not be completed because of the monsoon. The Respondent in the same letter declared as under:-

"We declare that we will not claim for any compensation or enhancement of rates for delay in completing the work because of such extension as applied for is granted to us."

Though the Form-A submitted by the Respondent does not bear any date, the acknowledgment which is given by the Railways shows that it was received by the Railways on 8-2-1999. It appears that on the same date i.e. 8-2-1999 a subsidiary agreement was entered into between the parties. According to that

time was extended till 20th April, 1999. It appears that even after grant of extension of time the Respondent did not start the work, therefore, a notice was given to him on 1-3-1999. Second notice was given on 9-3-1999 and ultimately by letter dated 22-3-1999 the contract was terminated at the risk, cost and consequences of the Respondent.

3. The Respondent invoked the arbitration clause and made several claims. First claim was for payment of work done under the contract. Second claim was for refund of the security deposit. Third claim was for loss of profit. Fourth claim was for underutilization of resources and fifth claim was for extra expenses on overheads during prolonged period.

4. The arbitrator by the award impugned has awarded Rs.13,020.00 for the work done, has directed refund of security deposit of Rs.30,000.00, has awarded Rs.40,121.00 towards loss of profit, has awarded Rs.1,65,000.00 for underutilization of resources and has awarded Rs.1,00,000.00 for extra expenses on overheads during prolonged period.

5. The learned Counsel appearing for the Petitioner

challenged before me the amounts awarded against claim Nos. 2, 3, 4 & 5. It is submitted that the award of the arbitrator awarding compensation and directing refund of security deposit suffers from non-application of mind to the relevant and material evidence on record. It is submitted that the last extension was granted up to 20th April, 1999 and that extension was granted pursuant to the application made by the Respondent which was received in the office of the Railways on 8-2-1999. The Respondent in that application had clearly stated that he could not do the work due to monsoon and he had declared that if he is granted extension of time, he will not claim any compensation. It is submitted that in the award the learned arbitrator has not considered that letter anywhere and therefore non-consideration of that letter vitiates the award. So far as award which directs refund of security deposit is concerned, it is submitted that the learned arbitrator has held that the termination of the contract was not justified because the work could not be done because initial levels were not recorded and extensions granted were not communicated prior to termination to the Respondent. It is submitted that there is no question of communicating the extensions

granted to the Respondent, because the extension was granted by agreement dated 8-2-1999 and the Respondent is a party to that agreement and though he applied for extension and agreement was executed, the work was not started and therefore the contract was terminated and therefore there was no question of returning the security deposit.

6. I have also heard the Respondent, who is not able to show me that the learned arbitrator has anywhere considered the application made by the Respondent for extension of time, which was received in the office of the Railways on 8-2-1999.

7. Now, if in the light of these rival submissions the award is perused, it becomes clear that the amounts awarded against claim Nos. 3, 4 & 5 are the amounts of compensation or damages against the Railways. The damages could have been awarded only on a finding that the work could not be completed because of the reasons attributable to the Railways. Perusal of the application submitted by the Respondent, which was received in the office of the Railways on 8-2-1999 shows that the Respondent himself has stated that the work could not be

completed because of monsoon. It is further pertinent to note here that even in the letter dated 11-12-1997 the Respondent has stated the same thing that the work could not be started during monsoon and subsequent wet ground conditions. The award of the arbitrator shows that the learned arbitrator has neither considered the letter dated 11-12-1997 nor the letter dated 8-2-1999. These letters clearly show that even according to the Respondent, the reason why the work could not be completed in time was not any action or inaction on the part of the Railways. It is further pertinent to note here that by letter dated 8-2-1999 the Respondent had undertaken not to claim any compensation for non-completion of the contract within the time for which he is granted extension. The declaration made by the Respondent operates as an estoppel against the Respondent from claiming compensation. In any case the letter dated 8-2-1999 was a relevant document and it was also material and therefore non-consideration of that letter discloses clear error of law apparent on the face of the award. Therefore, in my opinion, for this sole reason the award made by the learned Arbitrator against Claim Nos. 3, 4 & 5 is liable to be set aside. So far as award made against claim

No.2 is concerned, the learned Arbitrator while directing the Petitioner to refund the amount of security deposit has observed that the extension of time was not communicated to the Respondent. However, perusal of record shows that the Respondent himself is party to the agreement by which the extension of time has been granted. It is further to be seen here that the second reason which has been assigned by the learned arbitrator is that the Railways' officers did not record initial levels. But even according to the Respondent, as discussed above, that was not the reason for delay in completing the contract. It is further to be seen here that the fact remains that despite extension of time granted from time to time he could not complete the work and therefore, ultimately the contract was terminated in March, 1999. In my opinion, the finding recorded by the learned arbitrator for directing the Petitioner to refund the amount of security deposit also suffers from non-application of mind and is liable to be set aside. Accordingly, the amounts awarded against claim Nos. 2 to 5 are set aside.

8. By order made against claim No.6, the learned

arbitrator has awarded interest at the rate of 15% p.a. That amount of interest shall be payable on the amount awarded against claim No.1 only. Award modified accordingly. No order as to costs.

...